REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

AND THE

COURT OF APPEALS

OF THE

STATE OF NEVADA

Volume 131

BUZZ STEW, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* CITY OF NORTH LAS VEGAS, NEVADA, A MUNICIPAL CORPORATION, RESPONDENT.

No. 55220

January 29, 2015 341 P.3d 646

Appeal from a district court judgment on a jury verdict, on remand, in a real property action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Former landowner brought action against City, asserting claims for precondemnation damages and other causes of action. The district court dismissed the action for failure to state a claim. The supreme court, 124 Nev. 224, 181 P.3d 670 (2008), affirmed in part, reversed in part, and remanded. On remand, the district court entered judgment on jury verdict in favor of City. Former landowner appealed. The supreme court, HARDESTY, C.J., held that: (1) eventual construction of drainage easement was not taking of former landowner's property, (2) former landowner failed to support claim that diversion of flood water constituted a taking, and (3) district court did not clearly err in awarding costs to City.

Affirmed.

[Rehearing denied January 22, 2015]

GIBBONS, J., with whom CHERRY, J., agreed, dissented.

Law Offices of Kermitt L. Waters and *James J. Leavitt, Kermitt L. Waters, Michael A. Schneider*, and *Autumn L. Waters*, Las Vegas, for Appellant.

Holley, Driggs, Walch, Puzey & Thompson and *Stacy D. Harrop* and *Gregory J. Walch*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   Generally, an appeal does not lie from a district court order that denies a post-judgment motion for judgment notwithstanding the verdict.
2. EMINENT DOMAIN.
   Whether a taking has occurred is a question of law that the supreme court reviews de novo.
3. EMINENT DOMAIN.
   To bring a takings claim, the party must have a legitimate interest in property that is affected by the government's activity at the time of the alleged taking. Const. art. 1, § 8(6); U.S. CONST. amend. 5.
4. EMINENT DOMAIN.
   Contract for sale of land between former landowner and purchaser did not create easement in favor of former landowner over drainage project site, and thus, former landowner only had legitimate interest in property for period in which it owned land, and the eventual construction of drainage easement by City was not a taking of former landowner's property; contract did not reserve a property interest to former landowner, but rather merely notified purchaser that its title might be subject to a future drainage easement and reserved to former landowner only the right to proceeds arising from future condemnation action. Const. art. 1, § 8(6); U.S. CONST. amend. 5.
5. APPEAL AND ERROR.
   Whether an instrument has created an easement is a question of law that the supreme court reviews de novo.
6. CONTRACTS.
   When a contract is clear on its face, it will generally be construed from the written language and enforced as written.
7. EMINENT DOMAIN.
   There was no evidence that any pooling of water had occurred on property while former landowner owned it, or that former landowner suffered any substantial injury from any water diversion, and thus former landowner failed to support claim that diversion of flood water constituted a taking by the City, even though former landowner presented evidence that, during 100-year flood event, water might pool in one corner of property. Const. art. 1, § 8(6); U.S. CONST. amend. 5.
8. EMINENT DOMAIN.
   Takings claims lie only with the party who owned the property at the time the taking occurred. Const. art. 1, § 8(6); U.S. CONST. amend. 5.
9. EMINENT DOMAIN.
   A plaintiff in a takings action involving the drainage of surface waters must show both a physical invasion of flood waters and resulting substantial injury. Const. art. 1, § 8(6); U.S. CONST. amend. 5.

10. EMINENT DOMAIN.
    Question of whether City engaged in oppressive conduct after announcement of intent to condemn, for purposes of award of precondemnation damages to landowner, is one of fact for the jury to decide.
11. EVIDENCE.
    Expert witnesses may not testify as to their opinion on the state of the law.
12. EMINENT DOMAIN.
    Former landowner, in action for precondemnation damages arising out of City's alleged unreasonable delay in condemning property after publicly announcing its intent to do so, was not entitled to present expert testimony regarding City's alleged violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, where former landowner failed to show that federal funds were used for project. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 101 *et seq.*, 42 U.S.C. § 4601 *et seq.*
13. EMINENT DOMAIN.
    The district court did not clearly err in awarding costs to City as prevailing party, in former landowner's unsuccessful action for precondemnation damages against City, even though such costs would be curtailed in eminent domain action. Const. art. 1, §§ 8(6), 22(7); U.S. CONST. amend. 5; NRS 18.020.

Before the Court EN BANC.

OPINION[1]

By the Court, HARDESTY, C.J.:

Article 1, Section 8(6) of the Nevada Constitution states that a landowner's property may not be taken for public use without just compensation. In *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (*Buzz Stew I*), we recognized that, regardless of whether property has actually been taken, the just compensation provision requires compensating a landowner for a lesser invasion of his property rights when a would-be condemnor acts improperly following its announcement of intent to condemn, such as by unreasonably delaying condemnation of the property. *Id.* at 228-29, 181 P.3d at 672-73. Thus, in *Buzz Stew I*, we held that even though appellant Buzz Stew, LLC, failed to state a claim for the actual taking of its property, it could still maintain a claim for precondemnation damages against respondent City of North Las Vegas, and we remanded the matter for a jury trial on the issue of whether the City acted unreasonably in delaying its condemnation of Buzz Stew's property after publicly announcing its intent to do so. *Id.* at

[1]We originally resolved this appeal in a nonprecedential order of affirmance. Respondent City of North Las Vegas and nonparty Nevada Department of Transportation filed motions to publish the order as an opinion. We grant the motions and replace our earlier order with this opinion. *See* NRAP 36(f).

230, 181 P.3d at 674. On remand, the jury found that the City did not act unreasonably, and the district court entered judgment against Buzz Stew. Buzz Stew now appeals to this court for a second time.

In this appeal, Buzz Stew asserts that a new trial is required due to a number of errors made below, both with regard to the precondemnation claim and with respect to new evidence demonstrating that the City actually took its property. With respect to the latter assertion, we conclude that the evidence presented at trial did not establish that a taking occurred while Buzz Stew maintained an interest in the property, either by the eventual construction of a drainage system on the property or by any prior water invasion. Further, we conclude that no error made below warrants a new trial. Finally, we conclude that, even though costs are unavailable in eminent domain actions, here, costs may be recovered by the City with respect to the unsuccessful precondemnation claim. Therefore, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

Appellant Buzz Stew, LLC, purchased a 20-acre parcel of land located in North Las Vegas in 2002. Around this same time, respondent City of North Las Vegas was preparing to construct a flood waters drainage system that would traverse Buzz Stew's property. The City offered to purchase an easement across Buzz Stew's land, but Buzz Stew refused the offer. In 2003, the City publicly announced its intent to condemn the portion of the land needed for the project. A condemnation action was not filed, however, because the City was unable to secure construction funding. Notwithstanding its inability to proceed with the project, the City failed to publicly retract its prior public announcement of its intent to condemn the parcel. Buzz Stew subsequently sold the land in 2004 to a third party, Dark, LLC. In the seller's disclosures clause in the sale contract, Buzz Stew informed Dark, LLC, of the City's demand for a drainage easement, and Buzz Stew retained the right to any proceeds resulting from a condemnation of the area proposed in the easement.[2] Dark, LLC, eventually sold the property to Standard Pacific of Las Vegas, Inc., who thereafter granted the City an easement to accommodate the water drainage project.

A few years after selling the land, Buzz Stew filed a complaint against the City for inverse condemnation and precondemnation damages. The district court granted the City's motion to dismiss the

[2]The disclosures clause, part one, reads as follows:

> Seller discloses that there is a pending demand for permanent drainage easement for the Centennial Parkway Channel East Project, in favor of the City of North Las Vegas. Seller shall retain all rights to any proceeds arising out of any condemnation proceeding relating thereto, and buyer's title shall be subject to the drainage easement.

complaint for failure to state a claim, and Buzz Stew appealed. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (*Buzz Stew I*). In *Buzz Stew I*, we affirmed, in part, the district court's order dismissing the inverse condemnation claim because we concluded that Buzz Stew had not alleged any facts demonstrating that a taking had occurred. *Id.* at 230-31, 181 P.3d at 674. We also concluded that Buzz Stew had a viable claim for precondemnation delay damages because questions of fact remained regarding whether the City's delay in condemning the property after the City had publicly announced in 2003 its intent to condemn but then failed to do so was unreasonable and injurious. *Id.* at 230, 181 P.3d at 674. Accordingly, we reversed the district court's order as to Buzz Stew's precondemnation damages claim and remanded the matter for further proceedings. *Id.*

On remand, the district court declined to apply eminent domain and inverse condemnation principles to Buzz Stew's precondemnation damages claim and to instruct the jury on those principles. After the close of evidence in the seven-day jury trial, Buzz Stew orally indicated a desire to amend the pleadings to "conform to the evidence," asserting that takings claims should be allowed to proceed based on new evidence that had been presented at trial of the City's eventual construction of the drainage project in 2008 and of its diversion of water onto the property. While the district court appears to have agreed, it later clarified that it was rejecting the takings claims and ultimately instructed the jury on only the precondemnation claim.[3] Buzz Stew did not raise the amendment issue again or submit an amended complaint. The jury returned a verdict for the City, finding that the City's delay was not unreasonable. Buzz Stew then filed motions for a new trial and judgment notwithstanding the verdict, which the district court denied. The district court entered judgment in favor of the City and awarded it costs. This appeal followed.

[Headnote 1]

On appeal, Buzz Stew argues that newly discovered evidence presented at trial demonstrated that a taking of its property occurred, for which just compensation is due, and concerning which it should

[3]Some confusion exists regarding whether Buzz Stew successfully moved to amend its complaint. From Buzz Stew's record citations and our independent review of the record, it appears that the only occasion on which Buzz Stew asserted any intent to amend (as opposed to moving for a new trial or a judgment notwithstanding the verdict) was in a discussion with the trial judge at the close of evidence. There, counsel for Buzz Stew stated "we wanted to amend the pleadings [to] conform to the evidence [showing] . . . a taking . . . ," but the trial judge countered the court had "already ruled . . . [t]hat it's not [a taking]," and Buzz Stew did not pursue the matter further. We conclude that this oral exchange between Buzz Stew and the district court was insufficient to establish that Buzz Stew actually moved to amend the pleadings.

have been allowed to amend its complaint and recover, despite our prior opinion concluding that Buzz Stew had not stated a takings claim upon which relief could be granted.[4] The City asserts that no new evidence was presented at trial, that the law of the case doctrine precludes any takings claim, and that regardless, no taking of any property owned by Buzz Stew was shown. Because we are not convinced by the record that any compensable taking of Buzz Stew's property occurred, we conclude that the district court properly precluded Buzz Stew's newly asserted takings claims.

DISCUSSION

Pursuit of a new takings claim

[Headnotes 2, 3]

"Whether a taking has occurred is a question of law that [we] review[ ] de novo." *City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. 1, 11, 293 P.3d 860, 866 (2013). Pursuant to the Nevada and United States Constitutions, the government may not take private property for public use unless it pays just compensation. Nev. Const. art. 1, § 8(6); U.S. Const. amend. V. To bring a takings claim, the party must have "a legitimate interest in property that is affected by the government's activity" at the time of the alleged taking. Cliff Shadows, 129 Nev. at 11, 293 P.3d at 866; *see also McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006); *United States v. Dow*, 357 U.S. 17, 20 (1958). Thus, we first determine whether Buzz Stew had "a legitimate interest in property that is affected by the government's activity" at the time of the City's alleged taking. *Cliff Shadows*, 129 Nev. at 11, 293 P.3d at 866.

Buzz Stew asserts two bases for its takings argument: the eventual construction of a drainage channel on the property in 2008 and the diversion of flood waters over the property. Much of the conduct that Buzz Stew complains of as having occurred while it owned the property was previously presented to this court in *Buzz Stew I*, where we determined that the conduct was insufficient to support a takings claim. *See Buzz Stew I*, 124 Nev. at 230-31, 181 P.3d at 674. To the extent its claims rely on this conduct, we reject them as precluded by *Buzz Stew I*. *See Hsu v. Cnty. of Clark*, 123 Nev.

[4]Buzz Stew also argues that the district court improperly denied its motion for judgment notwithstanding the verdict, or judgment as a matter of law, in which Buzz Stew again sought to recover on new takings claims. Generally, however, "an appeal does not lie from a district court order that denies a post-judgment motion for judgment notwithstanding the verdict." *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 827 n.1, 102 P.3d 52, 56 n.1 (2004). Regardless, as explained in this opinion, Buzz Stew failed to demonstrate the viability of any new takings claims.

625, 629-30, 173 P.3d 724, 728 (2007) (explaining that the law of the case doctrine requires a ruling made on appeal be followed in subsequent proceedings in both the lower court and a later appeal).

[Headnotes 4-6]

Regarding the drainage channel, Buzz Stew argues that it has a property interest in the parcel because it reserved an easement over the project site in its land sale contract to Dark, LLC. The City disputes that an easement in favor of Buzz Stew was created. Whether an instrument has created "an easement is a question of law that we review de novo." *Cliff Shadows*, 129 Nev. at 7, 293 P.3d at 863. "Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (quoting *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)). Here, the plain language of the sales contract between Buzz Stew and Dark, LLC, merely notifies Dark, LLC, that its title may be subject to a future drainage easement and reserves to Buzz Stew only the right to proceeds arising from a future condemnation action. It does not reserve a property interest to Buzz Stew. As a result, Buzz Stew had a legitimate interest in the property affected by the City's project only from 2002-2004, when it owned the parcel. Therefore, we conclude that the eventual construction of the easement does not evince a taking of Buzz Stew's property.

[Headnotes 7-9]

As to the diversion of flood waters, Buzz Stew has failed to show that water was actually diverted onto the property during the time Buzz Stew held title. Takings claims lie only with the party who owned the property at the time the taking occurred. *Argier v. Nev. Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). Nevada law requires a plaintiff in a takings action involving the drainage of surface waters to show both a physical invasion of flood waters and resulting substantial injury. *Cnty. of Clark v. Powers*, 96 Nev. 497, 501 n.3, 504, 611 P.2d 1072, 1075 n.3, 1076 (1980); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647-48, 173 P.3d 734, 739-40 (2007). Although Buzz Stew presented evidence that during a 100-year flood event water may pool on one corner of the property, the evidence did not demonstrate that any pooling had occurred while Buzz Stew owned the property or that Buzz Stew suffered any substantial injury from any water diversion. Therefore, we reject Buzz Stew's claims that it demonstrated a diversion of flood water constituting a taking. Because Buzz Stew has failed to demonstrate any conduct by the City that would effect a taking, we conclude that the district court did not err in refusing to recognize a taking of Buzz

Stew's property, convert the case to a takings case, instruct the jury on takings, or order that just compensation was due to Buzz Stew.[5]

New trial

[Headnotes 10-12]

Buzz Stew additionally argues that multiple errors by the district court entitle it to a new trial.[6] We disagree. On the question of whether precondemnation damages were merited, Buzz Stew fails to express any argument refuting the jury's findings that the City's actions were not oppressive, as is required for an award of precondemnation damages.[7] *See Buzz Stew I*, 124 Nev. at 229, 181 P.3d at 673. To the extent Buzz Stew implies such an argument by asserting its experts should have been allowed to testify concerning the City's misconduct and violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), this argument is without merit. The question of oppressive conduct is one of fact for the jury to decide, *id.* at 230, 181 P.3d at 673, and because expert witnesses may not testify as to their "opinion on the state of the law," *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509, 780 P.2d 193, 196 (1989), the district court properly determined that Buzz Stew's experts could not state as a matter of law whether the City acted oppressively. As to any additional testimony regarding the Relocation Act, the district court did not err in excluding this evidence, as Buzz Stew failed to show that federal funds were used

[5]The dissent argues that *Buzz Stew I* impliedly recognized both a continuing property interest and the possibility of a takings claim by remanding for precondemnation damages and by noting that Buzz Stew may be entitled to just compensation. This reasoning first incorrectly assumes that in *Buzz Stew I* we impliedly remanded for a takings claim. Such was not the case. We remanded solely for a trial on precondemnation damages—a decision that rested in large part on our holding that there need be no taking before a party may bring a claim for precondemnation damages. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 229, 181 P.3d 670, 673 (2008). Second, in *Buzz Stew I* we did not interpret the contract clause at issue here, but we do so now, and we agree with the district court that Buzz Stew failed to reserve a property interest in the parcel. To the extent that the dissent's arguments rest on an interpretation that would recognize a continuing property interest to Buzz Stew, these arguments fail, as they assume that any reservation of the rights to future condemnation proceeds must rest on a continuing property interest and overlook the reality that it is the subsequent owner, not the party reserving the interest in future proceeds, who must bring suit, thereby leaving open the possibility that no suit will ever be brought and no such proceeds will ever be realized.

[6]We do not consider Buzz Stew's arguments regarding attorney misconduct, as these arguments are not properly before this court because Buzz Stew did not object to the conduct below and raises the issue for the first time on appeal. *See Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008).

[7]Because the jury did not reach the issue of precondemnation damages and because the question before the jury was whether Buzz Stew was entitled to precondemnation damages, we reject Buzz Stew's arguments that the district court abused its discretion (1) in admitting evidence that the project benefited the value of the property, and (2) excluding evidence referencing eminent domain.

for the project. *See Rhodes v. City of Chi. for Use of Sch.*, 516 F.2d 1373, 1377 (7th Cir. 1975); *Reg'l Transp. Dist. v. Outdoor Sys., Inc.*, 34 P.3d 408, 418 (Colo. 2001). And as to the other evidentiary errors asserted, in light of our holding that there was no taking and Buzz Stew's failure to present any facts that would support overturning the jury's verdict, we summarily dismiss those arguments.

[Headnote 13]

Finally, we are not persuaded by Buzz Stew's argument that the district court improperly awarded costs to the City. Generally, a prevailing party is entitled to costs. NRS 18.020; *see also Bergmann v. Boyce*, 109 Nev. 670, 678-79, 856 P.2d 560, 565 (1993). While in eminent domain actions such costs are curtailed, Nev. Const. art. 1, § 22(7), the present case was an unsuccessful action for precondemnation damages wherein the City prevailed on its defense. Therefore, we cannot say that under the facts of this case the district court clearly erred. *See Locklin v. City of Lafayette*, 867 P.2d 724, 756 (Cal. 1994) (holding that an inverse condemnation plaintiff who did not prevail on a takings claim was not entitled to be shielded by the law against awarding costs in eminent domain actions).[8] Accordingly, we affirm the judgment of the district court.

PARRAGUIRRE, DOUGLAS, SAITTA, and PICKERING, JJ., concur.

GIBBONS, J., with whom CHERRY, J., agrees, dissenting:

I disagree with the majority's conclusion that the district court did not abuse its discretion by denying Buzz Stew's motion to amend the pleadings. Therefore, I would reverse and remand the case to allow Buzz Stew to amend its pleadings to conform to the evidence presented at trial. Once amended, the trier of fact could determine if Buzz Stew sustained any precondemnation damages.

Buzz Stew retained a legitimate interest in the subject property through its land sale contract with Dark, LLC

The government cannot take private property for public use without paying just compensation. Nev. Const. art. 1, § 8(6); U.S. Const. amend. V. A party bringing a takings claim must have "a legitimate interest in property that is affected by the government's activity" at the time of the alleged taking. *City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. 1, 11, 293 P.3d 860, 866 (2013); *see also McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006); *United States v. Dow*, 357 U.S. 17, 20 (1958). The majority concludes that Buzz Stew does not have a valid takings claim, in part, because it did not have a "legitimate interest" in

[8]Because the City prevailed below and in light of our resolution of this appeal, we do not address its argument that the district court should have granted it summary judgment based on sovereign immunity.

the subject property when the drainage channel was constructed in 2008. I disagree.

In my view, Buzz Stew retained a "legitimate interest" in the subject property through its land sale contract with Dark, LLC. "Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (quoting *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)). Here, the plain language of the land sale contract states that Buzz Stew retains all rights to any proceeds arising out of the condemnation of the City's proposed easement. The majority concludes that through this reservation of rights, Buzz Stew only retained an interest in the proceeds from a future condemnation of the property, but did not retain any interest in the property itself. In my view, however, the plain language of the contract does not draw such a distinction. Instead, I conclude that by retaining an interest in the proceeds from a future condemnation, Buzz Stew also retained a sufficient interest in the property to maintain a takings claim. *Cliff Shadows*, 129 Nev. at 11, 293 P.3d at 866. As such the district court should have allowed Buzz Stew to amend the pleadings to include a takings claim. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) ("Leave to amend should be freely given when justice requires . . . .").

This court previously recognized Buzz Stew's interest in the subject property

In *Buzz Stew I*, we implicitly held that Buzz Stew had an actionable interest in the property when we remanded the case back to the district court to consider the reasonableness of the City's actions for precondemnation purposes. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228-29, 231, 181 P.3d 670, 672-73, 674-75 (2008). We also noted in *Buzz Stew I* that even though Buzz Stew no longer owned the property, "[Buzz Stew] may be entitled to compensation because just compensation should be paid to the person who was the owner at the time of the taking." *Id*. at 226 n.1, 181 P.3d at 671 n.1. It is inconsistent to now conclude that Buzz Stew lacked an interest in the property and not allow the issue to go to the jury. *See Hsu v. Cnty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) (stating that the law of the case doctrine requires that "the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal").

Therefore, because Buzz Stew retained a "legitimate interest" in the easement property, I depart from the majority and conclude that the district court abused its discretion by denying Buzz Stew's motion to amend the pleadings to conform to the evidence.

RALPH TORRES, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 61946

January 29, 2015 341 P.3d 652

Appeal from a judgment of conviction, pursuant to a guilty plea, of ex-felon in possession of a firearm. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

The supreme court, HARDESTY, J., held that: (1) officer's continued detention of defendant constituted illegal seizure, and (2) discovery of defendant's valid arrest warrant did not attenuate taint from illegal seizure.

Reversed and remanded.

Frederick B. Lee, Jr., Public Defender, and *Alina M. Kilpatrick*, Deputy Public Defender, Elko County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Mark Torvinen*, District Attorney, and *Mark S. Mills*, Deputy District Attorney, Elko County, for Respondent.

1. CRIMINAL LAW.
   In Fourth Amendment challenges, the supreme court reviews the district court's findings of fact for clear error but reviews legal determinations de novo. U.S. CONST. amend. 4.
2. ARREST.
   As long as the person to whom questions are put remains free to disregard the questions and walk away from police, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. U.S. CONST. amend. 4.
3. ARREST.
   If a reasonable person would not feel free to leave a police encounter, he or she has been "seized" within the meaning of the Fourth Amendment. U.S. CONST. amend. 4.
4. ARREST.
   If a person does not consent to a police encounter, a police officer may still stop a person and conduct a brief investigation when the officer has a reasonable, articulable suspicion that criminal activity is taking place or is about to take place. U.S. CONST. amend. 4; NRS 171.123(1).
5. ARREST.
   To conduct an investigative stop, the officer must have more than an inchoate and unparticularized suspicion or hunch that criminal activity is occurring; the officer must have some objective justification for detaining a person. U.S. CONST. amend. 4; NRS 171.123(1).
6. SEARCHES AND SEIZURES.
   Seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. U.S. CONST. amend. 4.

7. Arrest.
   For investigative stop to be reasonable, it must be temporary and last no longer than is necessary to effectuate the purpose of the stop. U.S. Const. amend. 4; NRS 171.123(1).
8. Arrest.
   Individual may not be detained even momentarily without reasonable, objective grounds for doing so. U.S. Const. amend. 4.
9. Arrest.
   Consensual encounter between a police officer and a detainee is transformed into a seizure in violation of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. U.S. Const. amend. 4.
10. Arrest.
    Continued detention of defendant after suspicion from original police encounter was cured transformed investigatory stop into illegal seizure in violation of Fourth Amendment: officer stopped defendant because officer thought defendant was a minor out past curfew and too young to be drinking; once defendant produced his identification card verifying he was not a minor and over the age of 21, officer no longer had reasonable suspicion to detain defendant; and rather than release defendant, officer continued to detain him and contact dispatch to check for warrants. U.S. Const. amend. 4; NRS 171.123(1), (4).
11. Criminal Law.
    The exclusionary rule generally requires courts to exclude evidence that police obtained in violation of the Fourth Amendment, thereby deterring any incentive for police to disregard constitutional privileges. U.S. Const. amend. 4.
12. Criminal Law.
    Courts must exclude evidence obtained after constitutional violation of Fourth Amendment as indirect fruits of illegal search or arrest. U.S. Const. amend. 4.
13. Criminal Law.
    Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of police. U.S. Const. amend. 4.
14. Criminal Law.
    For evidence that would not have come to light but for illegal actions of the police to be admissible, police must acquire the evidence by means sufficiently distinguishable to be purged of the primary taint.
15. Criminal Law.
    Without reasonable suspicion, discovery of arrest warrants cannot purge the taint from an illegal seizure. U.S. Const. amend. 4.
16. Criminal Law.
    Discovery of defendant's valid arrest warrant did not attenuate taint from police officer's illegal seizure of defendant, such that firearm evidence obtained during search incident to arrest was inadmissible as fruit of the poisonous tree in defendant's prosecution for being an ex-felon in possession of a firearm; detention of defendant at time of warrants check was not consensual, defendant was unable to leave encounter based on officer's retention of defendant's identification card, and officer did not have reasonable suspicion necessary to justify defendant's seizure. U.S. Const. amend. 4; NRS 171.123(4), 202.360(1)(a).

Before the Court En Banc.

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we determine whether the discovery of a valid arrest warrant purges the taint from the illegal seizure of a pedestrian, such that the evidence obtained during a search incident to the arrest is admissible. We conclude that the officer's continued detention of Ralph Torres, after he dispelled any suspicion that Torres was committing a crime, constituted an illegal seizure in violation of the Fourth Amendment and the fruits of that illegal seizure should have been suppressed. Therefore, we reverse the judgment of conviction.

FACTS

In February 2008, Officer Shelley observed a smaller male wearing a sweatshirt with the hood pulled over his head sway and stagger as he walked over a bridge in Elko, Nevada. Officer Shelley thought that the man might be intoxicated and too young to be out past curfew. He then parked his patrol car in a store parking lot at the end of the bridge and addressed Torres as he walked in that direction. Officer Shelley told Torres that he stopped him because he was concerned that Torres was too young to be out after curfew and that it appeared he had been drinking. He asked Torres for identification.

Torres gave Officer Shelley his California identification card (ID card), which revealed that Torres was over the age of 21, and thus, old enough to be out past curfew and consuming alcohol. After reading Torres's ID card, Officer Shelley retained the ID card as he recited Torres's information to police dispatch for verification and to check for outstanding arrest warrants. According to Officer Shelley, it is his standard practice to verify the identification information of every person he encounters because police officers are often given fake identification cards that contain inaccurate information. However, nothing in Officer Shelley's testimony indicated that anything about Torres's ID card seemed fake or inaccurate. Although Officer Shelley could not remember when he handed Torres his ID card back after reciting the information to dispatch, he stated that it is also his standard practice to keep an identification card in his possession until after he gets a response from dispatch.

Within five minutes of transmitting Torres's information to dispatch, Officer Shelley was informed that Torres had two outstanding arrest warrants from California. A second patrol officer arrived and, upon confirmation from dispatch that one of the warrants was extraditable, Officer Shelley took Torres into custody. After taking Torres into custody, Officer Shelley went to conduct a search incident to arrest, at which point Torres told him that he had a gun in his pocket. Officer Shelley then handcuffed Torres, removed a .22 caliber gun from his pocket, and located .22 ammunition in another pocket.

Torres was charged with being an ex-felon in possession of a firearm, receiving or possessing stolen goods, and carrying a concealed weapon. Torres filed a motion to suppress the handgun evidence and to ultimately dismiss the charges. Torres argued that his detention after Officer Shelley confirmed that he was not in violation of curfew was unconstitutional because Officer Shelley did not have suspicion that any other crime was occurring and Torres did not consent to the interaction. Therefore, once Officer Shelley knew Torres was of age, the encounter evolved into an illegal seizure that resulted in the discovery of the firearm. Torres also contended that the discovery of the warrant was not an intervening circumstance sufficient to purge the taint of the discovery of the handgun from the illegal seizure.

In response, the State argued that Officer Shelley had reasonable suspicion to detain Torres because of his stature, the time of day, and his apparent drunkenness, and that Torres consented to the encounter. The State further contended that the discovery of the warrant was an intervening circumstance sufficient to purge the taint of the possibly illegal seizure from the discovery of the handgun, and, therefore, the handgun evidence was not the fruit of an illegal seizure.

The district court denied Torres's motion to suppress because it determined that the initial contact between Officer Shelley and Torres was consensual. However, the district court did not make a determination about whether the consensual encounter became an illegal seizure. Instead, the district court determined the warrant to be an intervening circumstance and found that "the legality, or illegality, of Officer Shelley's decision to run a warrants check on [Torres] to be irrelevant to the legality of [Torres's] arrest." The court found the question irrelevant because the warrant would have been an "intervening circumstance" sufficient to purge the illegality of the seizure if the stop had become illegal. Upon the district court's denial of Torres's motion to suppress, Torres pleaded guilty to being an ex-felon in possession of a firearm pursuant to NRS 202.360(1)(a).[1] This appeal followed.

DISCUSSION

In this appeal, we consider whether the judgment of conviction must be reversed based on Torres's Fourth Amendment challenge and the district court's denial of his motion to suppress.[2] In reaching our conclusion, we first determine whether Officer Shelley's con-

[1]In *Gallegos v. State*, we concluded that paragraph (b) of NRS 202.360(1) was unconstitutionally vague. 123 Nev. 289, 163 P.3d 456 (2007). This holding does not affect the paragraph at issue here, paragraph (a) of NRS 202.360(1), or our analysis of the issues in this appeal.

[2]Torres reserved the right to challenge the denial of his motion to suppress on appeal. *See* NRS 174.035(3).

tinued detention of Torres constituted an illegal seizure. If so, we must decide whether the discovery of Torres's valid arrest warrant attenuated the taint from the illegal seizure, such that the firearm evidence obtained during a search incident to arrest was admissible.

Officer Shelley's continued detention of Torres resulted in an illegal seizure in violation of the Fourth Amendment

[Headnotes 1-3]

In Fourth Amendment challenges, this court reviews the district court's findings of fact for clear error but reviews legal determinations de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). Police encounters can be consensual. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* at 554. However, if a reasonable person would not feel free to leave, he or she has been "'seized' within the meaning of the Fourth Amendment." *Id.*

[Headnotes 4, 5]

If a person does not consent, "a police officer may [still] stop a person and conduct a brief investigation when the officer has a reasonable, articulable suspicion that criminal activity is taking place or is about to take place." *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000); *see also* NRS 171.123(1); *Terry v. Ohio*, 392 U.S. 1, 27 (1968). To conduct an investigative stop, an officer must have more than an "'inchoate and unparticularized suspicion or "hunch"'" that criminal activity is occurring; the officer must have "some objective justification for detaining a person." *Lisenbee*, 116 Nev. at 1128, 13 P.3d at 949 (quoting *Terry*, 392 U.S. at 27).

[Headnotes 6-8]

"But a 'seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.'" *State v. Beckman*, 129 Nev. 481, 487, 305 P.3d 912, 916-17 (2013) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). For an investigative stop to be reasonable, it "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "[An individual] may not be detained *even momentarily* without reasonable, objective grounds for doing so . . . ." *Id.* at 498 (emphasis added).

[Headnote 9]

"[T]he nature of the police-citizen encounter can change—what may begin as a consensual encounter may change to an investigative detention if the police conduct changes and vice versa." *United*

States v. Zapata, 997 F.2d 751, 756 n.3 (10th Cir. 1993). A consensual encounter is transformed into a seizure in violation of the Fourth Amendment "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984).

In *Lisenbee*, we considered such a transformation and determined the defendant was not "free to leave." 116 Nev. at 1128-30, 13 P.3d at 950-51. There, we concluded that after the defendant produced identification demonstrating he was not the possible suspect police were looking for, NRS 171.123(4) prevented further detention by police.[3] *Id.* Accordingly, the defendant's further detention was unreasonable and resulted in an illegal seizure. *Id. See also United States v. Lopez*, 443 F.3d 1280, 1285-86 (10th Cir. 2006) (holding that the officer's retention of the defendant's identification transformed a consensual encounter into an unconstitutional seizure because the officer's reasonable suspicion for the encounter was cured "[w]ithin seconds of reviewing [the defendant's] license," and, given the totality of the circumstances, the defendant would not have felt free to leave); *State v. Westover*, 10 N.E.3d 211, 219 (Ohio Ct. App. 2014) (concluding that "no reasonable person would [feel] free to terminate [an] encounter and go about their business, where an officer is holding that individual's identification and is using it to run a warrants check").

Veritably, scholars have noted the disagreement between other courts on whether a seizure has occurred for Fourth Amendment purposes when the police retain an individual's identification. *See* Aidan Taft Grano, Note, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 Colum. L. Rev. 1283 (2013) (highlighting the differences between the Fourth and the D.C. Circuit Courts regarding whether a consensual encounter can become a seizure solely through the retention of an individual's identification). In *United States v. Weaver*, the Fourth Circuit Court of Appeals held that an officer's retention of the defendant's identification beyond its intended purpose was not a seizure, as the defendant was a pedestrian, and, while "awkward," the defendant "could have walked away from the encounter [without his identification]." 282 F.3d 302, 311-12 (4th Cir. 2002). By contrast, in *United States v. Jordan*, the D.C. Circuit Court of Appeals held that a consensual encounter transformed into a seizure when officers retained the defendant's identification and continued questioning him, despite no "articulable suspicion that would have made a brief *Terry*-style detention reasonable." 958 F.2d 1085, 1086-89 (D.C. Cir. 1992).

[3]NRS 171.123(4) states in part that "[a] person must not be detained longer than is reasonably necessary to effect the purposes of this section [(temporary detention by peace officer of person suspected of criminal behavior)]."

Based on our previous holding in *Lisenbee*, and being mindful of NRS 171.123(4), we agree with the reasoning of the D.C. Circuit Court that generally a reasonable person would not feel free to leave when an officer retains a pedestrian's identification after the facts giving rise to articulable suspicion for the original stop have been satisfied.

[Headnote 10]

Here, Officer Shelley testified that he stopped Torres because Officer Shelley thought Torres was a minor out past curfew and too young to be drinking. Once Torres produced his ID card verifying he was not a minor and over the age of 21, the suspicion for the original encounter was cured and Officer Shelley no longer had reasonable suspicion to detain Torres. But rather than release Torres, Officer Shelley continued to detain him, and contacted dispatch to check for warrants. The officer explained his further detention of Torres as his "standard practice" because he "very often get[s] fake I.D.'s, altered information on I.D.'s, I.D.'s that resemble the person but is not truly that person." However, there is no evidence to show that Torres's ID card was fake or altered in any way. Like *Lisenbee*, where a consensual encounter transformed into an illegal seizure, Officer Shelley retained Torres's ID card after the reasonable suspicion for the original stop eroded.[4] Nothing in the record provides a basis for Shelley's continued detention of Torres or offers a basis for us to conclude that a reasonable person in Torres's position was free to leave. We conclude that under NRS 171.123(4), this continued detention of Torres transformed the investigative stop into an illegal seizure in violation of the Fourth Amendment. Because Torres was illegally seized, we must now examine whether the district court should have suppressed the firearm evidence Officer Shelley discovered in the search incident to arrest.

The firearm evidence should have been suppressed because it was the fruit of an illegal seizure

[Headnotes 11-14]

Generally, the exclusionary rule requires courts to exclude evidence that the police obtained in violation of the Fourth Amendment, thereby deterring any incentive for the police to disregard constitutional privileges. *See generally Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Courts must also exclude evidence obtained after the constitutional violation as "indirect fruits of an illegal search or arrest." *New York v. Harris*, 495 U.S. 14, 19 (1990). However,

[4]Because Torres was a pedestrian, we do not address the application of *Lisenbee* or NRS 171.123(4) to a traffic stop. *See, e.g.*, *State v. Lloyd*, 129 Nev. 739, 312 P.3d 467 (2013) (discussing warrantless searches and the automobile exception).

not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). The United States Supreme Court has found that when the constitutional violation is far enough removed from the acquisition of the evidence, the violation is sufficiently " 'attenuated [so] as to dissipate the taint' " of the illegality and the evidence may be admitted. *Id*. at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). To be admissible, the police must acquire the evidence "by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, 491 (internal quotations omitted) (excluding physical evidence because it was discovered "by the exploitation" of the illegality of the unlawful arrest, but not excluding statements made by the defendant several days after his arrest because the causal connection had attenuated "the primary taint" (internal quotations omitted)).

To resolve the suppression issue, the State urges this court to either create a per se rule of attenuation or apply the factors from *Brown v. Illinois*, 422 U.S. 590 (1975), and determine that attenuation exists here. Torres argues that we should not adopt the three-factor test from *Brown* to analyze whether the presence of an outstanding arrest warrant purges the taint of evidence discovered during an illegal seizure. We agree with Torres.

In *Brown*, the police arrested the defendant without probable cause and without a warrant. *Id.* at 591. Thereafter, the police gave the defendant comprehensive *Miranda*[5] warnings, and he proceeded to make incriminating statements. *Id*. The question presented to the United States Supreme Court was whether the *Miranda* warnings sufficiently attenuated the illegal arrest from the incriminating statements, such that the incriminating statements were not the fruit of the illegal arrest and were thus admissible. *Id.* at 591-92. In performing its attenuation analysis, the Court refused to adopt a "per se" rule of attenuation or lack thereof when a Fourth Amendment violation preceded *Miranda* warnings and subsequent confessions. *Id*. at 603. Rather, the Court established a three-part test for determining whether the taint of the evidence is attenuated from illegal police conduct such that the confession would be admissible: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . ." *Id.* at 603-04 (internal citation and footnote omitted). One factor alone is not dispositive of attenuation. *Id.* Applying those factors and limiting its decision to the facts of the case before it, the Court concluded that the lower court erroneously assumed "that the *Miranda* warnings, by themselves, . . . always purge the taint of an illegal arrest." *Id*. at 605.

[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[Headnote 15]

To be sure, the *Brown* factors are well suited to address the factual scenario of that case in determining "whether a confession is the product of a free will under *Wong Sun*." *Id.* at 603-04. We do not perceive the *Brown* factors as particularly relevant when, as here, there was no demonstration of an act of free will by the defendant to purge the taint caused by an illegal seizure.[6] Accordingly, in the absence of reasonable suspicion, the discovery of an arrest warrant is not "sufficiently distinguishable to be purged of the primary taint" from an illegal seizure. *Wong Sun*, 371 U.S. at 488 (internal quotations omitted). Thus, we agree with the Ninth and Tenth Circuits, as well as the Supreme Court of Tennessee, that without reasonable suspicion, the discovery of arrest warrants cannot purge the taint from an illegal seizure. *See Lopez*, 443 F.3d 1280; *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973); *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000).

[Headnote 16]

We conclude that the further detention of Torres was not consensual at the time of the warrants check, and thus Torres was illegally seized. The officer retained Torres's ID card longer than necessary to confirm Torres's age, rendering Torres unable to leave. Because the officer did not have reasonable suspicion necessary to justify the seizure under NRS 171.123(4), the evidence discovered as a result of the illegal seizure must be suppressed as "fruit of the poisonous tree" since no intervening circumstance purged the taint of the illegal seizure. Therefore, we conclude that the district court in this case should have suppressed the evidence of the firearm discovered on Torres's person after the investigative stop transformed into an illegal seizure.

For the reasons set forth above, we reverse the judgment of conviction and remand this matter to the district court to allow Torres to withdraw his guilty plea.

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

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[6]Some courts have considered the *Brown* factors when the "intervening circumstance" is the discovery of an arrest warrant, but these cases do not adequately address the difference between an intervening circumstance caused by a defendant's act of free will to purge the primary taint and the absence of a defendant's free will resulting from an illegal seizure. *See, e.g.*, *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir. 1997); *Golphin v. State*, 945 So. 2d 1174, 1191-93 (Fla. 2006); *People v. Mitchell*, 824 N.E.2d 642, 649-50 (Ill. App. Ct. 2005).

DAVID ABARRA, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62107

February 5, 2015 342 P.3d 994

Appeal from a district court order granting a motion to dismiss for failure to exhaust administrative remedies. First Judicial District Court, Carson City; James Todd Russell, Judge.

The supreme court, PARRAGUIRRE, J., held that: (1) inmate exhausted his administrative remedies under state law; (2) inmate exhausted his administrative remedies under Federal Prison Litigation Reform Act; and (3) inmate failed to state a claim for violation of his due process rights.

Affirmed in part, reversed in part, and remanded.

Robison Belaustegui Sharp & Low and *Therese M. Shanks* and *Kent R. Robison*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, and *Clark G. Leslie*, Senior Deputy Attorney General, Carson City, for Respondent.

1. PRISONS.
   The requirement for a prisoner to first exhaust his or her administrative remedies only applies to available administrative remedies. NRS 41.0322(1).
2. PRISONS.
   Inmate exhausted his administrative remedies, as required by state law, for claim that he was improperly convicted of violating rule prohibiting providing legal services for a fee, where associate warden's letter stated that inmate exhausted the grievance process, the grievance was moot, and no further response would be forthcoming. NRS 41.0322(1).
3. PRISONS.
   Inmate's grievances fulfilled the exhaustion requirement of the Federal Prison Litigation Reform Act, where they provided the facts that formed the basis for a claim, which all revolved around his contentions that he was improperly found guilty of and punished for violating rule prohibiting providing legal services for a fee, the grievance sets forth those facts, and, thus, the prison had sufficient notice, and the associate warden's letter made continued efforts at exhaustion futile. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).
4. PRISONS.
   Federal Prison Litigation Reform Act requires prisoners to exhaust administrative remedies before filing suit. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).
5. PRISONS.
   Under the Federal Prison Litigation Reform Act, a prison's grievance process defines the level of detail necessary in a grievance to comply with the grievance procedures. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).

6. Prisons.
   Under the Federal Prison Litigation Reform Act, if the grievance procedures do not instruct prisoners on what precise facts must be alleged in a grievance, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).
7. Prisons.
   Under the Federal Prison Litigation Reform Act, a grievance need not include legal terminology or legal theories, nor does it need to contain every fact necessary to prove each element of an eventual legal claim. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).
8. Constitutional Law; Prisons.
   Inmate failed to state a claim for violation of his due process rights in imposition of discipline for violation of rule that prohibited providing legal services for a fee, where some evidence supported the disciplinary findings against him, including his possession of another inmate's form, and a note stating that an unspecified item would be the usual price. U.S. Const. amend. 14.
9. Constitutional Law.
   Due process requires that, at a minimum, some evidence supports prison disciplinary findings. U.S. Const. amend. 14.

Before Parraguirre, Saitta and Pickering, JJ.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we are asked to determine whether the district court erred in dismissing appellant's complaint against various state entities and prison officials for failure to exhaust administrative remedies. Additionally, we are asked to determine whether appellant stated a due process claim in his complaint. We hold that the district court erred in concluding that appellant failed to exhaust his administrative remedies; however, the district court correctly determined that appellant failed to state a due process claim. Therefore, we affirm in part, reverse in part, and remand.

FACTS

In February 2011, a correctional officer at Northern Nevada Correctional Center (NNCC) found appellant David Abarra, an NNCC inmate, carrying 21 pills, a contraband pornographic magazine that included a note stating that an unspecified item or service would be "the usual price," and another inmate's completed W-2 form. NNCC charged Abarra with, among other things, unauthorized trading or bartering and providing legal services for a fee. Abarra pleaded guilty to bartering but pleaded not guilty to providing legal services for a fee (an "MJ29" violation).

At a disciplinary hearing, Abarra stated that although he was guilty of passing contraband, the "usual price" note was in reference to the magazine itself and that he was returning the W-2 to another prisoner as part of his work as a prison law clerk. The NNCC convicted Abarra of the MJ29 violation and, as punishment, removed him from his position as a law clerk.

Abarra challenged the MJ29 discipline through an informal grievance, followed by a first-level formal grievance.[1] According to the first-level grievance, Abarra disagreed "with the finding of guilt on the MJ29. There is no showing of any legal work being done or any proof of fees being charged." He also disagreed with the severity of his punishment. In response, Abarra received a letter from NNCC's associate warden stating that Abarra "exhausted the grievance process on this issue, therefore [his grievance] is moot and no further response is forth coming [sic]."

Thereafter, Abarra filed a complaint in district court asserting five claims: (1) improperly filing the MJ29 disciplinary charge, (2) refusing to correct the improper MJ29 charge at the disciplinary hearing, (3) improperly convicting him of violating MJ29, (4) violating his due process rights by refusing to hear his grievance appeals, and (5) retaliation for exercising his First Amendment rights. The State filed a motion to dismiss, and the district court concluded that dismissal was proper because Abarra failed to exhaust the grievance process. According to the district court, Abarra did not exhaust claims one (improper filing), two (failure to correct), four (due process), and five (first amendment) because his grievance only addressed claim three (the actual finding of guilt). Further, Abarra did not exhaust claim three (improper finding of guilt) because he never filed a second-level grievance. The district court also dismissed Abarra's fourth claim (due process) because he had no liberty interest in a disciplinary appeals process. Abarra now appeals.

DISCUSSION

On appeal, Abarra argues that (1) he exhausted the administrative remedies for claim three because the associate warden's letter rendered pursuit of further remedies futile; (2) he exhausted the administrative remedies for claims one, two, four, and five because they were included in his grievances; and (3) he adequately pleaded a due process claim.

This court reviews de novo an order granting dismissal under NRCP 12(b)(5). *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

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[1]The prison's grievance process requires an inmate to first file an informal grievance, followed by first- and second-level formal grievances. *See generally* NDOC AR 740.

Abarra exhausted the administrative remedies for claim three

[Headnotes 1, 2]

In order to initiate an action for damages against the Department of Corrections, a prisoner must first exhaust his or her administrative remedies. NRS 41.0322(1). However, the exhaustion doctrine only applies to *available* administrative remedies. *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 129 Nev. 775, 779, 312 P.3d 475, 478 (2013). To that end, this court has declined to require exhaustion "when a resort to administrative remedies would be futile." *Malecon Tobacco, LLC v. State, Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002).

NNCC's associate warden responded to Abarra's first-level grievance with a letter stating that Abarra "exhausted the grievance process" and that "no further response is forth coming [sic]." This letter forestalls, in no uncertain terms, any further efforts by Abarra to pursue his grievance. Further efforts by Abarra would have been futile, meaning he fulfilled the exhaustion requirement set out in NRS 41.0322(1) for claim three and any other claims asserted through his first-level grievance. *See id.*

Abarra exhausted the administrative remedies for claims one, two, four, and five

[Headnotes 3-7]

Like NRS 41.0322(1), the federal Prison Litigation Reform Act (PLRA) requires prisoners to exhaust administrative remedies before filing suit. 42 U.S.C. § 1997e(a) (2012). Under the PLRA, a prison's grievance process defines " '[t]he level of detail necessary in a grievance to comply with the grievance procedures.' " *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir. 2012) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)). If the grievance procedures do not "instruct prisoners on what precise facts must be alleged in a grievance, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.' " *Id.* (quoting *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009)). Thus, "[a] grievance need not include legal terminology or legal theories," nor does it need to "contain every fact necessary to prove each element of an eventual legal claim." *Griffin*, 557 F.3d at 1120. This is in accord with Nevada's own jurisprudence, where "[a] plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading." *Liston v. LVMPD*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

The pertinent prison regulations require a first-level grievance to consist of "a signed, sworn declaration of facts that form the basis for a claim." NDOC AR 740.06 § 2. The grievance procedures do not require more than the underlying facts, and they do not require

a separate grievance for each legal theory. Here, Abarra's grievance provides the "facts that form the basis for a claim." *Id.* All of Abarra's claims revolve around his contentions that he was improperly found guilty of and punished for the MJ29 violation. His grievance sets forth those facts. Therefore, the prison had sufficient notice of claims one, two, four, and five.[2] Accordingly, Abarra fulfilled the exhaustion requirement for claims one, two, four, and five because they were included in the grievances he submitted, and the associate warden's letter made continued efforts at exhaustion futile.

Abarra failed to state a due process claim

[Headnotes 8, 9]

Due process requires that, at a minimum, "some evidence" supports disciplinary findings. *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999). Abarra failed to state a due process claim because some evidence supports the disciplinary findings against him. Abarra was found guilty of providing legal services for a fee based on his possession of another inmate's W-2 and a note stating that an unspecified item would be "the usual price." Although the conclusion that the note and W-2 were related is tenuous, it cannot be said that these facts do not constitute some evidence. The district court properly dismissed claim four because the State presented some evidence to support the disciplinary findings.

Accordingly, we reverse the district court's order dismissing Abarra's complaint in part and affirm in part; we remand this matter for further proceedings.

SAITTA and PICKERING, JJ., concur.

CARMEN JONES, M.D., APPELLANT, *v.* NEVADA STATE BOARD OF MEDICAL EXAMINERS, RESPONDENT.

No. 64381

February 5, 2015 342 P.3d 50

Appeal from a district court order denying a motion to change venue. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

State Board of Medical Examiners filed petition for order compelling physician to comply with administrative subpoena issued in

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[2]Indeed, requiring greater specificity would undermine the purpose of a notice pleading standard for grievances. *See Griffin*, 557 F.3d at 1120 ("The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation.").

investigation of physician for allegedly aiding a third party in the unauthorized practice of medicine. Physician filed motion to change venue. The district court denied the motion, and physician appealed. The supreme court held that venue for petition was proper in county where work of the Board was taking place.

Affirmed.

Hafter Law and *Jacob L. Hafter*, Las Vegas, for Appellant.

Bradley O. Van Ry, Reno, for Respondent.

1. HEALTH.
   "Proceeding" of State Board of Medical Examiners in investigation of physician for allegedly aiding a third party in the unauthorized practice of medicine, for purposes of determining district court venue for Board petition to compel physician to comply with administrative subpoena, was in county where Board did its administrative work, including filing formal complaint and issuing order of summary suspension, and was not in county where conduct being investigated occurred. NRS 630.355(1).
2. APPEAL AND ERROR.
   The supreme court reviews an order denying a motion to change venue for a manifest abuse of discretion but reviews questions of law, such as statutory interpretation, de novo. NRAP 3A(b)(6).
3. STATUTES.
   If a statute is clear on its face, the supreme court will not look beyond its plain language.

Before HARDESTY, C.J., DOUGLAS and CHERRY, JJ.

OPINION

Per Curiam:

In this appeal, we must determine where venue is appropriate for a petition for contempt, arising from a party's failure to comply with an administrative subpoena issued by the Nevada State Board of Medical Examiners, or to otherwise properly participate in a proceeding before the Board. We conclude that NRS 630.355(1)'s language, providing that venue is proper in "the district court of the county in which the proceeding is being conducted," means that venue lies in the county where the work of the Board takes place, rather than the county where the conduct being investigated occurred. Thus, we affirm the district court's order denying the motion to change venue.

FACTS AND PROCEDURE

After a preliminary investigation, respondent Nevada State Board of Medical Examiners filed an administrative complaint against appellant Carmen Jones, M.D., alleging among other things that Dr. Jones aided a third party in the unauthorized practice of med-

icine. In furtherance of the Board's investigation, it issued a subpoena to Dr. Jones to obtain patient records in accordance with NRS 630.140(1)(b), which authorizes the Board to issue administrative subpoenas to compel the production of documents. When Dr. Jones failed to comply with the subpoena, the Board petitioned the Second Judicial District Court, located in Washoe County, for an order compelling compliance with its administrative subpoena under NRS 630.140 and NRS 630.355.

Relying on a general venue statute, NRS 13.040, which states in part that "the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action," Dr. Jones filed a motion to change the venue of the subpoena contempt petition to the Eighth Judicial District Court, which is located in Clark County, arguing that the petition to enforce the subpoena should have been brought in Clark County where she resides and practices medicine. Dr. Jones also argued that if the Legislature intended for Board contempt petitions to be filed in Washoe County, the statute should have been drafted to state that specifically. Dr. Jones further contended that it would be inconvenient for her to participate in the proceedings in Washoe County, and as the Board is a statewide agency and that Board investigators visited her practice in Clark County, it thus would not be a hardship for the Board to pursue its contempt proceeding in Clark County.

In opposition to Dr. Jones's motion to change venue, the Board argued that the subpoena contempt petition against Dr. Jones was properly filed in the Second Judicial District Court because the statute governing venue for contempt petitions brought by the Board, NRS 630.355(1), provides that the Board may seek a contempt order in the "district court of the county in which the proceeding is being conducted." The Board stated that its administrative proceeding against Dr. Jones is taking place in and arises from its office in Washoe County, that all formal complaints and summary suspensions are filed in its office in Washoe County, and that all hearings on formal complaints and summary suspensions are held at its office in Washoe County. Thus, the Board contended, venue is proper in the Second Judicial District Court under NRS 630.355(1). The Board also argued that the general venue rules contained in NRS Chapter 13 and relied on by Dr. Jones apply to actions to be tried in the district court, and thus, changing the place of trial. Since a Board of Medical Examiners' subpoena contempt petition is not a trial or substantially related district court action, the Board asserted that its petition was therefore not subject to NRS Chapter 13.

The district court denied Dr. Jones's motion for a change of venue, finding that under NRS 630.355(1) venue in the Second Judicial District Court was proper. This appeal followed.

DISCUSSION

[Headnote 1]

On appeal, Dr. Jones argues that the district court failed to consider NRS Chapter 13, including the doctrine of forum non conveniens, in denying her motion to change venue. And because Dr. Jones and all of the witnesses are located in Clark County, Dr. Jones insists that venue is proper in Clark County.[1] Dr. Jones also argues that "proceeding," as used in NRS 630.355(1), should be interpreted to mean the Board's investigation, which she contends is taking place in Las Vegas because that is where she practices medicine. The Board contends that because it had filed a formal administrative complaint against Dr. Jones and had previously issued an order of summary suspension of her license in its Washoe County office, and the administrative proceeding was taking place in that county at the time the Board petitioned the district court for an order of contempt, the Second Judicial District Court is the proper venue to bring the contempt proceeding.[2]

[Headnotes 2, 3]

NRAP 3A(b)(6) allows for an appeal from a district court order denying a motion to change venue. This court reviews such an order for a manifest abuse of discretion, *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 113 Nev. 610, 613, 939 P.2d 1049, 1051 (1997), but we review questions of law, such as statutory interpretation, de novo. *See Washoe Cnty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012). If the statute is clear on its face, we will not look beyond its plain language. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012).

NRS 630.355(1) states in relevant part: "If a person, *in a proceeding before the Board*, a hearing officer or a panel of the Board: (a) Disobeys or resists a lawful order[,] . . . the Board, hearing

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[1]Dr. Jones raises several other arguments in her opening brief related to the district court's order on the subpoena contempt proceedings, as well as procedural issues related to that order. As only the portion of the district court's order regarding the motion to change venue is properly at issue in this appeal, *see* NRAP 3A(b)(6), we do not address Dr. Jones's additional arguments.

[2]The Board also argues that this appeal should be dismissed as moot on the basis that no controversy exists because the Board has already acquired information that will enable it to obtain the documents it requested from Dr. Jones. A review of the district court's docket shows that the Board has not moved to dismiss or withdraw the contempt proceedings, however, and, if contempt is demonstrated, the Board would be entitled to sanctions against Dr. Jones for her contempt in failing to comply with the subpoena. *See* NRS 630.355(3). This appeal is therefore not moot. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (providing that a case is moot when a live controversy no longer exists).

officer or panel may certify the facts *to the district court of the county in which the proceeding is being conducted*." (Emphasis added.) We have previously held that a specific venue statute takes precedence over the general venue statutes. *Cnty. of Clark v. Howard Hughes Co., LLC*, 129 Nev. 410, 413, 305 P.3d 896, 897 (2013) (concluding that because NRS 361.420(2), a specific venue statute regarding challenges to property tax valuations, conflicts with NRS 13.030's general venue rule, NRS 361.420(2)'s specific venue rules control). Because NRS 630.355(1) specifically addresses where venue is proper in a contempt action arising from Board proceedings, and NRS Chapter 13's provisions are general venue statutes, we conclude that NRS 630.355(1) is the controlling statute. *Id.* Dr. Jones's arguments regarding NRS Chapter 13's general venue provisions, including NRS 13.050(2)(c)'s consideration of the convenience of the witnesses, are thus unavailing.

Having concluded that NRS 630.355(1) controls venue in this matter, we now address the statute's language, which provides that venue is proper in "the district court of the county in which the proceeding is being conducted." Although the language of the statute appears to be unambiguous, the parties each ascribe a different meaning to the statute's use of the word "proceeding." Dr. Jones contends that "proceeding" as used in the statute refers to the Board's investigation of Dr. Jones, which she asserts is taking place in Clark County where she practices medicine and where the alleged conduct being investigated occurred. The Board argues that "proceeding" means its administrative process, including its hearings regarding Dr. Jones's conduct, which take place at its Washoe County office. Because the statute does not define "proceeding," and the parties each advance a different definition, we may look beyond the plain meaning of the statute to determine where venue properly lies. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000) (holding that a court should consult other sources, including analogous statutory provisions, when a statute has no plain meaning); *see also Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 627 F.3d 1268, 1270 (9th Cir. 2010) ("When determining the plain meaning of language, we may consult dictionary definitions." (internal quotation omitted)); *Nat'l Coalition for Students v. Allen*, 152 F.3d 283, 289 (4th Cir. 1998) (noting that courts "customarily turn to dictionaries for help in determining whether a word in a statute has a plain or common meaning").

To determine the meaning of "proceeding" as used in NRS 630.355(1), we look to the word's plain and ordinary meaning and to analogous statutory provisions. *Black's Law Dictionary* defines "proceeding" as "[t]he business conducted by a court or other offi-

cial body; a hearing." *Black's Law Dictionary* 1324 (9th ed. 2009). This definition supports the Board's contention that proceeding should be read to mean the "business conducted by" the Board, including hearings, suspensions, and the issuance of subpoenas and orders.

Looking next to analogous Nevada Statutes that allow other administrative boards, commissions, and agencies to institute contempt actions in the district court also supports the Board's argument that the Legislature intended for it to pursue contempt orders in Washoe County. *See* NRS 485.197 (Department of Motor Vehicles); NRS 632.390 (State Board of Nursing); NRS 637.190 (Board of Dispensing Opticians); NRS 637B.137 (Board of Examiners for Audiology and Speech Pathology); NRS 638.144 (State Board of Veterinary Medical Examiners); NRS 640.163 (State Board of Physical Therapy Examiners); NRS 640E.320 (State Board of Health); NRS 641A.185 (Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors); NRS 641B.425 (Board of Examiners for Social Workers); NRS 645.720 (Real Estate Commission); NRS 645G.560 (Division of Financial Institutions); NRS 648.160 (Private Investigator's Licensing Board); NRS 673.453 (Department of Business and Industry); NRS 703.370 (Public Utilities Commission). In each of these statutes, the Legislature has provided that administrative boards, commissions, and agencies may seek contempt orders to enforce subpoenas in the district court of the county where the administrative hearing is taking place. *See State, Div. of Ins.*, 116 Nev. at 294, 995 P.2d at 485 (explaining that statutes should be construed together when they seek to accomplish the same purpose); *see also We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (noting that when possible, courts should interpret statutes in harmony with other statutes). Although a hearing on the Board's formal complaint against Dr. Jones has apparently not yet occurred, Dr. Jones does not dispute that the hearings on this complaint will take place in the Board's offices in Washoe County.

NRS 630.355(1) governs the specific situation when a party fails to comply with an administrative subpoena or otherwise refuses to properly participate in a proceeding before the Nevada State Board of Medical Examiners. The statute allows the Board to enforce compliance with its administrative process. Considering this statute's effect and that "proceeding" is commonly defined as the business or hearings conducted by an official body, *Black's Law Dictionary* 1324 (9th ed. 2009), we interpret NRS 630.355(1) to mean that venue for a contempt proceeding brought by the Board under that statute is proper in the county where the administrative work of the Board is taking place. In this case, the Board's administrative work, including its filing of a formal complaint and its previous issuance

of an order of summary suspension of Dr. Jones's license, took place in the Board's Washoe County office. Thus, the Second Judicial District Court is the proper venue for the contempt proceeding against Dr. Jones, and the district court did not manifestly abuse its discretion in denying her motion to change venue. *Nat'l Collegiate Athletic Ass'n*, 113 Nev. at 613, 939 P.2d at 1051. For these reasons, we affirm the district court's order.

FULBRIGHT & JAWORSKI LLP, A TEXAS LIMITED LIABILITY PARTNERSHIP; AND JANE MACON, A TEXAS RESIDENT, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, RESPONDENTS, AND VERANO LAND GROUP, LP, A NEVADA LIMITED PARTNERSHIP, REAL PARTY IN INTEREST.

No. 65122

February 5, 2015 342 P.3d 997

Original petition for a writ of prohibition challenging a district court order denying a motion to dismiss for lack of personal jurisdiction.

Texas-based law firm filed petition for a writ of prohibition, seeking to vacate district court order denying firm's motion to dismiss for lack of personal jurisdiction in real estate development litigation with Nevada-based client. The supreme court, HARDESTY, C.J., held that: (1) firm's contacts with Nevada were insufficient to subject firm to general personal jurisdiction; (2) firm's representation of former client, combined with communication incidental to that representation, was insufficient to support specific personal jurisdiction; and (3) attendance at investor presentations was insufficient to support specific personal jurisdiction.

Petition granted in part and denied in part.

Snell & Wilmer L.L.P. and *Alex L. Fugazzi* and *Kelly H. Dove*, Las Vegas; *Snell & Wilmer L.L.P.* and *Matthew L. Lalli*, Salt Lake City, Utah, for Petitioners.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones, Matthew S. Carter*, and *Carol L. Harris*, Las Vegas, for Real Party in Interest.

1. PROHIBITION.
   Writ of prohibition is available to arrest or remedy district court actions taken without or in excess of jurisdiction.

2. PROHIBITION.
   Relief by writ of prohibition is an extraordinary remedy, and the supreme court typically exercises its discretion to consider a writ petition only when there is no plain, speedy, and adequate remedy in the ordinary course of law.
3. PROHIBITION.
   While an appeal is generally considered to be an adequate legal remedy precluding relief by writ of prohibition, the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant.
4. CONSTITUTIONAL LAW; COURTS.
   When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction exists; in so doing, the plaintiff must satisfy the requirements of Nevada's long-arm statute and show that jurisdiction does not offend principles of due process. U.S. CONST. amend. 14; NRS 14.065.
5. CONSTITUTIONAL LAW.
   Under the Fourteenth Amendment's Due Process Clause, a nonresident defendant must have sufficient minimum contacts with the forum state so that subjecting the defendant to the state's jurisdiction will not offend traditional notions of fair play and substantial justice. U.S. CONST. amend. 14.
6. CONSTITUTIONAL LAW.
   Due process requirements are satisfied, for purposes of personal jurisdiction, if the nonresident defendants' contacts are sufficient to obtain either: (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendant to suit in the forum state. U.S. CONST. amend. 14.
7. CONSTITUTIONAL LAW.
   A court may exercise general jurisdiction over a nonresident defendant consistent with due process when its contacts with the forum state are so continuous and systematic as to render the defendant essentially at home in the forum state. U.S. CONST. amend. 14.
8. CONSTITUTIONAL LAW.
   A general jurisdiction inquiry calls for an appraisal of a nonresident defendant's activities in their entirety, nationwide and worldwide, for purposes of exercising personal jurisdiction consistent with due process. U.S. CONST. amend. 14.
9. CONSTITUTIONAL LAW; COURTS.
   Texas-based law firm's contacts with Nevada, which included one of its attorneys registering as a lobbyist during two legislative sessions and pro hac vice appearances by its attorneys in two lengthy lawsuits in Nevada that resulted in jury verdicts in their clients' favor, were not substantial activities that were so continuous and systematic that Nevada could be considered law firm's home, and thus firm's Nevada-based former client failed to make prima facie showing that firm was subject to general personal jurisdiction under long-arm statute consistent with due process, in former client's breach of fiduciary duty action against firm. U.S. CONST. amend. 14; NRS 14.065.
10. CONSTITUTIONAL LAW.
    Unlike general jurisdiction, specific jurisdiction is proper under the Due Process Clause only where the cause of action arises from the nonresident's contacts with the forum. U.S. CONST. amend. 14.

11. Constitutional Law.
    To exercise specific personal jurisdiction over a nonresident defendant consistent with due process, the defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state; the cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. U.S. Const. amend. 14.
12. Constitutional Law; Courts.
    Texas-based law firm's representation of Nevada-based client in Texas-based matter, combined with client-related correspondence into Nevada that was incidental to that representation, were insufficient to make a prima facie showing of specific personal jurisdiction over law firm and attorney under long-arm statute consistent with due process, in former client's breach of fiduciary duty action against firm and attorney; firm did not actively seek out former client's business, but rather it was former client's general partner that reached out to firm in Texas, and matter for which firm was retained was Texas real-estate-development project. U.S. Const. amend. 14; NRS 14.065.
13. Constitutional Law; Courts.
    Attendance at investor presentations in Nevada by attorney from Texas-based law firm did not amount to attorney and firm purposefully availing themselves of the privilege of acting in Nevada, as required to support specific personal jurisdiction over firm and attorney under long-arm statute consistent with due process, in Nevada-based former client's breach of fiduciary duty action against firm and attorney, absent evidence as to how attorney's legal advice at two presentations related to former client's causes of action. U.S. Const. amend. 14; NRS 14.065.
14. Constitutional Law.
    Purposeful availment requires that the cause of action arise from the consequences in the forum state of the defendant's activities, for purposes of exercising specific personal jurisdiction over a nonresident consistent with due process. U.S. Const. amend. 14.
15. Courts.
    An out-of-state law firm that is solicited by a Nevada client to represent the client on an out-of-state matter does not subject itself to personal jurisdiction in Nevada simply by virtue of agreeing to represent the client.

Before Hardesty, C.J., Douglas and Cherry, JJ.

OPINION

By the Court, Hardesty, C.J.:

In this original petition for a writ of prohibition, we consider whether a Texas-based law firm's representation of a Nevada client in a Texas matter, by itself, provides a basis for specific personal jurisdiction in Nevada. While we conclude that it does not and grant petitioners' petition for a writ of prohibition insofar as it seeks to vacate the district court's order denying their motion to dismiss, we nonetheless, deny petitioners' writ petition to the extent that it seeks

to direct the district court to grant their motion to dismiss because additional evidence may have been procured in discovery while this writ petition was pending that may support a prima facie showing of personal jurisdiction.

FACTS

The underlying lawsuit seeks redress for complications that arose in connection with a real-estate development project in San Antonio, Texas. As is relevant to this writ petition, the project began in 2006 when three individuals, who were the managers of a Nevada limited liability company named Triple L Management, LLC, began acquiring parcels of real estate in San Antonio. The real estate was acquired based on its proximity to a yet-to-be-constructed branch campus of Texas A&M University, and Triple L's managers solicited funds from investors based on the real estate's projected increase in value.

By July 2006, Triple L's managers had raised more than $20 million from individual investors who were predominantly Nevada residents, and escrow closed on the acquired property that same month.[1] Title to the property was put in the name of real party in interest Verano Land Group, LP, a limited partnership created by Triple L's managers wherein Triple L retained managerial control as Verano's general partner and the investors were designated as limited partners. Verano was registered as a Texas partnership, and in December 2006, Verano (via its general partner Triple L, via Triple L's three managers) sought out and retained the Texas law firm of Fulbright & Jaworski LLP, a petitioner herein, to provide Verano with legal guidance pertaining to the development project.[2] At the time of this case's underlying events, Fulbright & Jaworski was a limited liability partnership registered in Texas with offices throughout the United States, although it had no offices in Nevada and none of its attorneys were licensed to practice in Nevada. As Verano's complaint in the underlying action would later explain, Verano solicited Fulbright & Jaworski based upon the fact that one of its partners, petitioner and Texas resident Jane Macon, was the former city attorney for San

[1]The complaint in the underlying action also indicates that, at some point, another $45 million was generated from the same investors, which was used to purchase additional acreage near the projected location of the Texas A&M campus. The complaint, however, does not allege that petitioners were involved in generating those additional funds.

[2]The record contains conflicting evidence as to whether petitioners helped Triple L's managers create Verano and register Verano as a Texas partnership or if, instead, Triple L's managers did so on their own before retaining petitioners. At any rate, throughout the time that petitioners served as Verano's counsel, Verano was managed by a Nevada-based general partner, and because petitioners do not appear to take issue with the characterization, we refer to Verano as a Nevada-based client.

Antonio and was therefore "highly experienced and connected in the San Antonio development and planning arena."

Between 2006 and 2010, Macon served as Fulbright & Jaworski's point of contact for Verano, and Macon, in turn, dealt with Verano's general partner, Triple L, regarding the legal matters pertaining to Verano's development project. During that time, Macon sent numerous e-mails and placed repeated phone calls to Triple L's managers in Nevada concerning Verano's project. Petitioners also sent billing invoices to Triple L's Nevada mailing address, which were paid from a Nevada bank account. During 2007 and 2008, Macon worked with Triple L, Texas A&M, and the City of San Antonio to finalize an agreement wherein Verano would donate a portion of its real estate to Texas A&M and, in exchange, the City of San Antonio would provide Verano with roughly $250 million in public funds, which Verano would use to further develop the property that it retained. As part of consummating this agreement, however, Macon and Triple L created a separate entity, VTLM Texas, LP, that was to serve as Verano's agent for purposes of dealing with Texas A&M and the City of San Antonio.[3] Consequently, under the finalized exchange agreement, Verano donated roughly 700 acres of land to Texas A&M, and VTLM Texas was denominated as the entity entitled to receive the public funds.

In August and September of 2010, Macon traveled to Las Vegas on two occasions to participate in two presentations to Verano's investors regarding the project's status. Shortly after those presentations, and allegedly as a result of the information conveyed at the presentations, Verano's investors began to question whether Triple L and its managers were adequately representing Verano's interests. Thereafter, near the end of 2010, a supermajority of Verano's investors voted to remove Triple L from its role as Verano's general partner and to replace Triple L with a new general partner. Throughout most of 2011, Macon continued to represent Verano, and in so doing, communicated with Verano's new general partner regarding the status of the project. By late 2011, however, the attorney-client relationship between petitioners and Verano had terminated. The record does not clearly reflect the date on which the relationship was terminated or which party terminated the relationship, but in any event, in November 2011, Verano's new general partner re-registered Verano as a Nevada partnership.

Verano then instituted the underlying action in 2012, naming petitioners as defendants.[4] Generally speaking, Verano's complaint

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[3]Macon would later explain that a separate entity was created in an attempt to minimize Verano's investors' income tax liabilities. The propriety of that decision appears to be a primary component of Verano's claims against petitioners.

[4]Verano also named Triple L, Triple L's three managers, VTLM Texas, and various other entities as defendants. Those defendants are no longer parties to the underlying action.

alleged that petitioners had breached their fiduciary duties and engaged in self-dealing by donating more of Verano's land to Texas A&M than Verano had originally intended to donate and by assisting Triple L in creating VTLM Texas in order to usurp the City of San Antonio's public funds. Petitioners filed a motion to dismiss, contending that their contacts with Nevada were insufficient to subject them to personal jurisdiction. Verano opposed the motion, arguing that petitioners were subject to both general and specific personal jurisdiction. In particular, Verano contended that Fulbright & Jaworski's contacts with Nevada in unrelated matters were sufficient to subject the firm to general personal jurisdiction for purposes of the underlying matter. Additionally, Verano contended that petitioners were subject to specific personal jurisdiction because they had purposefully availed themselves of the privilege of acting in Nevada by agreeing to represent a Nevada-based client, by directing correspondence to that client in Nevada, and by participating in two presentations in Nevada.

The district court agreed that Verano had made a prima facie showing that petitioners were subject to both general and specific personal jurisdiction and denied petitioners' motion to dismiss. Petitioners then filed this writ petition. After the writ petition was filed, the parties continued to engage in discovery in preparation for trial until this court entered an order staying the underlying proceedings.

DISCUSSION

Standard of review

[Headnotes 1-3]

"A writ of prohibition is available to arrest or remedy district court actions taken without or in excess of jurisdiction." *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 373, 328 P.3d 1152, 1156 (2014). Writ relief is an extraordinary remedy, and this court typically exercises its discretion to consider a writ petition only when there is no plain, speedy, and adequate remedy in the ordinary course of law. *Id.* While an appeal is generally considered to be an adequate legal remedy precluding writ relief, *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004), the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant. *Viega*, 130 Nev. at 373-74, 328 P.3d at 1156. Because petitioners challenge the district court's ruling regarding personal jurisdiction, we elect to exercise our discretion and consider this writ petition. *Id.* This court reviews de novo a district court's determination of personal jurisdiction. *Id.*

Jurisdiction over a nonresident defendant

[Headnotes 4-6]

When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction exists.

Trump v. Eighth Judicial Dist. Court, 109 Nev. 687, 692, 857 P.2d 740, 743-44 (1993). In so doing, the plaintiff must satisfy the requirements of Nevada's long-arm statute and show that jurisdiction does not offend principles of due process. *Id.* at 698, 857 P.2d at 747; NRS 14.065. Under the Fourteenth Amendment's Due Process Clause, a nonresident defendant must have sufficient "minimum contacts" with the forum state so that subjecting the defendant to the state's jurisdiction will not "offend traditional notions of fair play and substantial justice." *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006) (internal quotations omitted). "Due process requirements are satisfied if the nonresident defendants[ʼ] contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendant[ ] to suit [in the forum state]." *Viega*, 130 Nev. at 375, 328 P.3d at 1156. Because Nevada's long-arm statute, NRS 14.065, permits personal jurisdiction over a nonresident defendant unless the exercise of jurisdiction would violate due process, our inquiry in this writ petition is confined to whether the exercise of jurisdiction over Fulbright & Jaworski and Macon comports with due process. *Id.*

Thus, in order to overcome petitioners' motion to dismiss, Verano needed to make a prima facie showing of either general or specific personal jurisdiction by "produc[ing] some evidence in support of all facts necessary for a finding of personal jurisdiction." *Trump*, 109 Nev. at 692, 857 P.2d at 744. Because the district court determined that Verano had made a prima facie showing of general and specific personal jurisdiction as to both Fulbright & Jaworski and Macon, we consider the two bases for jurisdiction in turn.

Verano has not made a prima facie showing of general personal jurisdiction

[Headnotes 7, 8]

"A court may exercise general jurisdiction over a [nonresident defendant] when its contacts with the forum state are so ʻ"continuous and systematic" as to render [the defendant] essentially at home in the forum State.ʼ" *Viega*, 130 Nev. at 375, 328 P.3d at 1156-57 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see also Arbella Mut. Ins. Co.*, 122 Nev. at 513, 134 P.3d at 712 ("[G]eneral personal jurisdiction exists when the defendant's forum state activities are so substantial or continuous and systematic that it is considered present in that forum and thus subject to suit there, even though the suit's claims are unrelated to that forum." (internal quotations omitted)). A general jurisdiction inquiry "calls for an appraisal of a [defendant's] activities in their

entirety, nationwide and worldwide." *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

[Headnote 9]

In support of its prima facie showing of general personal jurisdiction over Fulbright & Jaworski,[5] Verano introduced evidence showing that a Fulbright & Jaworski attorney was a registered lobbyist during both the 2007 and 2009 Nevada legislative sessions and that seven Fulbright & Jaworski attorneys had been admitted pro hac vice in Nevada for the purpose of representing two different clients in lengthy litigation, stemming back to the early 2000s and unrelated to the underlying litigation, that "resulted in multi-million dollars of verdicts." Contrary to the district court's conclusion that this evidence was sufficient to make a prima facie showing of general jurisdiction over Fulbright & Jaworski, we are not persuaded.

In isolation, the evidence of Fulbright & Jaworski's activities in Nevada may arguably be substantial, but those activities presumably comprise only a fraction of Fulbright & Jaworski's overall business. *See Daimler AG*, 571 U.S. at 139 n.20. Thus, in this case, we conclude that a registered lobbyist during two legislative sessions and pro hac vice appearances by Fulbright & Jaworski attorneys in two lengthy lawsuits in Nevada that result in jury verdicts in their clients' favor are not substantial activities that are so continuous and systematic that Nevada can be considered Fulbright & Jaworski's home. To conclude otherwise would subject Fulbright & Jaworski to suit in Nevada in connection with any claim that any of its clients throughout the world may have against the firm. *See Arbella Mut. Ins. Co.*, 122 Nev. at 513, 134 P.3d at 712. Based on this reasoning, we conclude that Verano failed to make a prima facie showing that petitioners were subject to general personal jurisdiction, and the district court improperly used general jurisdiction as a basis for denying petitioners' motion to dismiss.

Verano has not made a prima facie showing of specific personal jurisdiction

[Headnotes 10, 11]

"Unlike general jurisdiction, specific jurisdiction is proper only where 'the cause of action arises from the defendant's contacts with the forum.'" *Dogra v. Liles*, 129 Nev. 932, 937, 314 P.3d 952, 955 (2013) (quoting *Trump*, 109 Nev. at 699, 857 P.2d at 748). In other

[5]Although the district court also determined that Macon was subject to general jurisdiction in Nevada, the basis for that determination is unclear, as the record contains no evidence to suggest that Macon's contacts with Nevada were such that she could be subject to general personal jurisdiction. Thus, we do not further discuss this issue as it pertains to Macon.

words, in order to exercise specific personal jurisdiction over a nonresident defendant,

> "[t]he defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. The cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."

Consipio Holding, BV v. Carlberg, 128 Nev. 454, 458, 282 P.3d 751, 755 (2012) (quoting *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 387, 552 P.2d 49, 53 (1976)). Verano contends, and the district court agreed, that this standard was satisfied in light of Verano's evidence showing that petitioners agreed to represent a Nevada-based client and directed client-related correspondence into Nevada, as well as by virtue of Macon's participation in the two investor presentations in Nevada. We must determine whether this evidence, if considered in isolation or cumulatively, is sufficient to make a prima facie showing of specific personal jurisdiction over petitioners. *See Consipio Holding*, 128 Nev. at 457, 282 P.3d at 754; *Trump*, 109 Nev. at 692, 857 P.2d at 743-44.

> *Representing a Nevada client on an out-of-state matter does not necessarily subject an out-of-state law firm to personal jurisdiction*

[Headnote 12]

We first consider whether an out-of-state law firm's representation of a Nevada client, combined with the communications that are incident to an attorney-client relationship, is sufficient in and of itself to subject the law firm to specific personal jurisdiction in Nevada. The Tenth Circuit Court of Appeals recently addressed this identical issue in *Newsome v. Gallacher*, 722 F.3d 1257, 1279-81 (10th Cir. 2013), and the court's opinion provides helpful guidance to us here.

In *Newsome*, a Canadian law firm was hired by a Canadian-based company and its United States subsidiary doing business in Oklahoma. *Id.* at 1262-63. As part of the firm's work for the companies, the firm helped consummate a business transaction in Canada, "facilitated" the placement of liens on certain property in Oklahoma, and received payments from an Oklahoma bank account. *Id.* at 1280-81. A bankruptcy trustee for the subsidiary company then sued the Canadian firm in Oklahoma. *Id.* at 1263. On appeal, the Tenth Circuit considered whether the lower court properly dismissed the firm from the case for lack of personal jurisdiction.

As part of its analysis, the *Newsome* court canvassed decisions from other jurisdictions and arrived at what it believed to be a "majority" approach and a "minority" approach to the issue of whether an out-of-state law firm's representation of a client is sufficient to subject the law firm to personal jurisdiction in the client's home state. *Id.* at 1280. The *Newsome* court identified the "majority" approach as one that declines to find personal jurisdiction over an out-of-state law firm based solely on its representation of an in-state client. *Id.* In so doing, the *Newsome* court explained, "[t]he majority reasons that representing a client residing in a distant forum is not necessarily a purposeful availment of that distant forum's laws and privileges" and that, instead, "[t]he client's residence is often seen . . . as a mere fortuity." *Id.* (internal quotations omitted). Similarly, under the majority approach, communications incidental to the attorney-client relationship that are directed to the forum state simply because the client resides there are also seen as merely fortuitous and do not constitute purposeful availment. *See, e.g.*, *Sawtelle v. Farrell*, 70 F.3d 1381, 1391-92 (1st Cir. 1995) (concluding that "written and telephone communications with the clients in the state where they happened to live" were not sufficient to subject an out-of-state law firm to personal jurisdiction); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (explaining that placing phone calls to the client in the forum state, mailing letters to the client in the forum state, and accepting payments from the client's forum-state bank are all "normal incidents of . . . representation" that, "by themselves, do not establish purposeful availment"); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 226 (8th Cir. 1987) (concluding that phone calls made to the client's home state, monthly billings mailed to the client's home state, and payments made from the client's home-state bank were not sufficient to subject an out-of-state law firm to personal jurisdiction); *Exponential Biotherapies, Inc. v. Houthoff Buruma N.V.*, 638 F. Supp. 2d 1, 9 (D.D.C. 2009) ("Plaintiff must establish more than the attorney-client relationship and contacts incidental to the attorney-client relationship in order to meet . . . constitutional due process requirements."); *We're Talkin' Mardi Gras, LLC v. Davis*, 192 F. Supp. 2d 635, 640 (E.D. La. 2002) ("[A]ll of the communications to Louisiana rest on nothing more than the mere fortuity that [the client] happened to be a resident of Louisiana. They would have been the same regardless of where [the client] lived. Thus such communication can not be considered purposeful availment . . . .").

In contrast, the *Newsome* court explained, "[t]he minority view reasons that attorneys can accept or reject representing clients in distant forums, and that those who accept such representation have fair warning that they might be sued for malpractice in the client's forum." 722 F.3d at 1280 (internal quotations omitted). The *New-*

some court also recognized that, under the minority approach, "the normal communications that make up an active attorney-client relationship are [seen as] the sort of repeated, purposeful contacts with the client's home forum sufficient to establish personal jurisdiction." *Id.* (citing *Cartlidge v. Hernandez*, 9 S.W.3d 341, 348 (Tex. App. 1999)); *see Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1272 (Colo. 2002) (concluding that "communications and attempted communications with [a client] by mail and telephone" were among the "purposeful contacts" that an attorney made with the forum state).

Ultimately, the *Newsome* court agreed with the majority approach and affirmed the dismissal of the Canadian law firm for lack of personal jurisdiction. 722 F.3d at 1280-81. To that end, it concluded narrowly that "an out-of-state attorney working from out-of-state on an out-of-state matter does not purposefully avail himself of the client's home forum's laws and privileges, at least not without some evidence that the attorney reached out to the client's home forum to solicit the client's business." *Id.* We agree with this conclusion and its formulation of the majority approach in two key respects. First, we agree that a lack of solicitation on the out-of-state law firm's part is highly relevant to the inquiry of whether the firm purposefully availed itself of the privileges of acting in Nevada. Second, we agree that an out-of-state firm's representation of a client on a non-Nevada "matter" is highly relevant to that same inquiry.

Applying the majority approach here leads to the conclusion that petitioners did not subject themselves to specific personal jurisdiction in Nevada simply by virtue of representing Verano. It is undisputed that petitioners did not actively seek out Verano's business, but rather, it was Verano's general partner that reached out to petitioners in Texas.[6] Similarly, it cannot reasonably be disputed that the "matter" for which petitioners were retained to represent Verano was a Texas real-estate-development project.[7] Thus, we conclude that petitioners' representation of Verano on an out-of-state matter and petitioners' communications with Verano that were incidental to

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[6]In this regard, our decision in *Peccole v. Eighth Judicial District Court*, 111 Nev. 968, 899 P.2d 568 (1995), is distinguishable. While we stated in *Peccole* that "use of the telephone can be sufficient for 'purposeful availment,'" *id.* at 971, 899 P.2d at 570 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985)), that statement was made in the context of concluding that the Colorado defendants may have solicited the Nevada plaintiffs' business via telephone. *See id.*

[7]We disagree with Verano's suggestion that petitioners "always treated" the project "as an investment project by Nevadans and for Nevadans." To the contrary, petitioners' engagement agreement with Verano expressly stated that petitioners were being retained "in connection with advising you regarding a real estate, economic development and tax increment financing matters concerning a Texas A&M University location in San Antonio, Texas (the 'Matter')."

that representation is, without more, not sufficient to make a prima facie showing of specific personal jurisdiction.

> *Based on the existing record, Verano's evidence of petitioners' additional Nevada contacts is insufficient to make a prima facie showing of personal jurisdiction*

[Headnote 13]

We next consider whether Macon's attendance at two presentations in Las Vegas was sufficient contact in Nevada to make a prima facie showing of personal jurisdiction. In opposing petitioners' motion to dismiss, Verano submitted an affidavit from one of its investors attesting to the fact that he attended two presentations in 2010 in Las Vegas at which Macon participated. According to the investor, at those presentations, Macon (1) solicited additional investment funds from Verano's investors; and (2) failed to disclose the existence of VTLM Texas, the entity that Macon helped to create as part of the alleged effort to deprive Verano of the public funds from the City of San Antonio. Based on this evidence, the district court concluded that Macon had provided "legal advice" to Verano's investors in Nevada and that, consequently, petitioners had purposefully availed themselves of the privilege of acting in Nevada.

[Headnote 14]

We are not persuaded that this evidence amounted to purposeful availment sufficient to make a prima facie showing of specific personal jurisdiction. Purposeful availment requires that "[t]he cause of action . . . arise from the consequences in the forum state of the defendant's activities." *Consipio Holding*, 128 Nev. at 458, 282 P.3d at 755 (internal quotations omitted). Here, although the district court concluded that Macon provided "legal advice" to Verano's investors at the two presentations, the record contains no indication of what that legal advice was, much less how Verano's causes of action against petitioners arose from that legal advice. *See id.*

As the above-described majority approach recognizes, a law firm does not purposefully avail itself of the benefit of acting in the client's home state simply by meeting with the client in that state. *See, e.g.*, *Sher*, 911 F.2d at 1363 (concluding that three trips to the client's home state of California to meet with the client "were discrete events arising out of a case centered entirely in Florida [that] appear[ed] to have been little more than a convenience to the client"); *Austad Co.*, 823 F.2d at 226 (concluding that a law firm associate's three-day visit to the client's office for the purpose of reviewing documents was insufficient to show purposeful availment). Thus, without any evidence as to how Macon's legal advice at the two Las Vegas presentations related to Verano's causes of action against petitioners, we conclude that Macon's two trips to Nevada did not

amount to petitioners purposefully availing themselves of the privilege of acting in Nevada. *See Consipio Holding*, 128 Nev. at 458, 282 P.3d at 755.

We further note that the affidavit from Verano's investor, while providing slightly more detail than the district court's order, suffers from the same shortcoming. Specifically, although the investor attested to Macon soliciting additional investment funds, Verano's complaint contains no allegation that any additional funds were raised as a result of Macon's solicitations, much less that those funds were somehow misspent and thereby form a basis for Verano's claims against petitioners. Similarly, it is not immediately apparent from Verano's complaint how Macon's failure to mention the existence of VTLM Texas, which at the time of the presentations had been in existence for at least two years, relates to Verano's causes of action against petitioners. *See id.* In any event, we question whether those nonstatements regarding a Texas entity would "have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant[s] reasonable." *Id.* (internal quotations omitted).

CONCLUSION

[Headnote 15]

Based on the evidence presented to the district court, we conclude that Verano failed to make a prima facie showing that petitioners are subject to general or specific personal jurisdiction. In particular, we conclude that an out-of-state law firm that is solicited by a Nevada client to represent the client on an out-of-state matter does not subject itself to personal jurisdiction in Nevada simply by virtue of agreeing to represent the client. Moreover, because Verano's additional evidence of petitioners' Nevada contacts have no clear connection to Verano's causes of action against petitioners, we conclude that Verano failed to make a prima facie showing of personal jurisdiction.

We therefore conclude that writ relief is warranted to the extent that petitioners seek an order directing the district court to vacate its May 9, 2013, order denying petitioners' motion to dismiss. To the extent that petitioners seek an order directing the district court to grant their motion to dismiss, however, we conclude that our extraordinary intervention is unwarranted at this time. In particular, because Verano was only required to make a prima facie showing of personal jurisdiction at the pretrial stage, and because additional jurisdiction-related evidence may have been produced during discovery that was ongoing during this writ petition's pendency, Verano is entitled to make a prima facie showing of personal jurisdiction

with this additional evidence at its disposal.[8] Accordingly, consistent with the foregoing, we grant petitioners' writ petition in part and deny the petition in part, and we direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order denying petitioners' motion to dismiss.[9]

DOUGLAS and CHERRY, JJ., concur.

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[8]In this regard, Verano's December 17, 2014, motion to file a supplemental appendix is denied. *See Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) ("This court is not a fact-finding tribunal . . . .").

[9]In light of our resolution of this writ petition, the stay imposed by our November 21, 2014, order is vacated.